Supreme Court, U.S.
FILED
DEC 16 2004
OFFICE OF THE CLERK

NO. 04-825

IN THE
Supreme Court of the United States

KRISTIAN LEHR STAUFFER,
Petitioner
v.
THE UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari to the
Texas Court of Appeals, Fourteenth Supreme Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE WARRANTLESS USE OF A DOG SNIFF AT THE DOOR OF A PRIVATE HOME CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE REASONING AND HOLDING OF *KYLLO V. UNITED STATES*, 533 U.S. 27 (2001) APPLIES TO THE WARRANTLESS USE OF A DRUG-SNIFFING DOG AT THE DOOR OF A PRIVATE HOME.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties.

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NO. _____

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On Petition for Writ of Certiorari to the Texas Court of Appeals, Fourteenth Supreme Judicial District

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Petitioner, Kristian Lehr Stauffer, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Texas Court of Appeals for the Fourteenth District entered on February 12, 2004. (Appendix A). A Petition for Discretionary Review was refused by the Texas Court of Criminal Appeals on September 29, 2004. (Appendix B).

OPINIONS BELOW

In an opinion filed on February 12, 2004, a panel of the Court of Appeals for the Fourteenth District of Texas

affirmed the judgment of the 183rd District Court of Harris County, Texas. *Stauffer v. State*, 2004 WL 253520 (Tex. App. – Houston [14th Dist.] (Appendix A).

STATEMENT OF JURISDICTION

On February 12, 2004, a three (3) judge panel of the Court of Appeals for the Fourteenth District of Texas affirmed the judgment of conviction. A Petition for Discretionary Review was timely filed with the Texas Court of Criminal Appeals. The petition was refused on September 29, 2004.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the early morning hours of October 4, 2000, a team of law enforcement agents executed a search warrant at David Smith's home in Houston, Texas. Officers discovered and seized, among other things, approximately 660 grams of methamphetamine. The drug was found in a rear corner bedroom of the house, far from the garage and front door. Ms. Stauffer was present and in control of the premises at the time of the seizure. Ms. Stauffer was subsequently charged by indictment with possession with intent to deliver methamphetamine.

In this case, the trial court record reveals that Ms. Stauffer was arrested during the execution of nearly identical warrants issued simultaneously, based on seven substantially identical probable cause statements. Controlled substances were found at only two of seven locations; the second seizure was a misdemeanor quantity

of marijuana.

Ms. Stauffer filed a Motion to Suppress Evidence. She asserted that the affidavit contained information gathered from an illegal warrantless search and seizure by law enforcement, in violation of the Fourth Amendment to the United States Constitution, when evidence was obtained by utilizing a drug-sniffing dog to sniff at the garage door of the residence. She also contended that the affidavit in support contained material misrepresentations, and/or falsehoods and/or omissions. The State stipulated that Ms. Stauffer has standing to challenge the search and seizure.

The affidavit of Houston Police Officer Fernandez stated in relevant part:

> On October 4, 2000, I spoke with P. Foose, a peace officer employed by the Harris County Sheriff's Department as a narcotics dog handler. He stated that his canine partner is Rocky. He is a certified dog handler and Rocky is a certified narcotics detection dog and the Texas K-9 Police Association certifies them both. Rocky is trained to detect the odor of marijuana, cocaine, methamphetamine, and heroin. On October 4, 2000, he and Rocky went to 519 Shawnee, Houston, Harris County, Texas. He and Rocky walked up to the (sic) to the residence and walked next to the garage of the residence. He stated that he and Rocky walked to the residence in a manner that would be most commonly used by any member of the general public. Rocky was allowed to examine the garage door where air from the inside of the garage could escape to the outside.

> Rocky gave a positive alert on the lower corner of the garage door. The positive alert indicates the presence of the odor of marijuana or cocaine or methamphetamine or heroin within the garage of the residence at 519 Shawnee. (emphasis added)

There was a lengthy hearing in which the defense presented two dog training experts (Dr. Dan Craig and Robert Gonzales), Officer Foose and Debbie Farmer, a dog trainer that approves dogs for certificates issued by the "Texas K-9 Police Association" which is a private, for profit, unregulated business. Farmer issued Rocky certificates for marijuana, heroin, cocaine and a legal drug, amphetamine. Rocky has no State or federal government certification. Foose said that he went to the house twice, the second and last time returning at 3:30 a.m. because no one was stirring. It was his intention to use Rocky to gather evidence, undetected by the occupants.

The experts said that Rocky's alert was not a reliable indication of the presence of a controlled substance, for several reasons. Among them were that the affidavit only connected the "alert" to the odor of a controlled substance, which could be from a variety of remote, stale and transient sources. Foose had destroyed most of Rocky's training records. Rocky was trained on lawful, as well as unlawful, substances. Rocky was neither trained nor tested on the outside of houses or buildings. He was only trained and

tested to find odiferous items hidden inside rooms and automobiles. The information communicated by Rocky's scratching and breathing was based on interpretation by Foose, and no one else. There were other criticisms.

The trial court denied the motion to suppress evidence.

There was no opinion, no fact findings, and no application of the facts to the law. The trial court therefore, was making an implied finding that this warrantless use of the drug-sniffing dog at the door of the residence was not an illegal search under the Fourth Amendment, and that the affidavit was not defective for relying on the so-called dog alert.

Ms. Stauffer entered a conditional plea of guilty and, with the Court's permission, pursuant to Texas law, appealed the denial of the motion to suppress evidence.

On appeal, the Texas Court of Appeals for the Fourteenth District affirmed the conviction and sentence, holding that the drug-dog sniff did not unlawfully violate Stauffer's reasonable expectation of privacy. *Stauffer v. State, supra.* (Appendix A). Therefore, the drug-dog procedure did not constitute a search under the United States Constitution. *Id.*

A Petition for Discretionary Review was filed with the Texas Court of Criminal Appeals raising the federal question of whether the warrantless use of the drug-sniffing

dog under the uncontroverted facts developed in the trial court was a search under the Fourth Amendment, whether the trial court erred by impliedly finding that Rocky was well trained to alert only on the presence of a controlled substance, and whether the affidavit was fatally flawed by material falsehoods, misrepresentations and omissions.

The Texas Court of Criminal Appeals refused the petition on September 29, 2004. (Appendix B).

REASONS FOR GRANTING THE WRIT

1. The State Court of Appeals expressly found that the Supreme Court has not issued standards for the constitutional use of a drug-sniffing dog. The Court of Appeals stated: "We have previously noted that the United States Supreme Court has failed to establish guidelines for the reliability of 'sniff searches,' citing *Josey v. State*, 981 S.W.2d 831, 845 (Tex. App. – Houston [14th Dist.] 1998), pet. ref'd."

2. The Court of Appeals erroneously held that the drug-dog sniff of a home did not constitute a search under the Fourth Amendment to the United States Constitution, citing *Porter v. State*, 93 S.W. 3d 342, 346-47 (Tex. App. – Houston [14th Dist.] 2002), *pet. ref'd. Porter* turns entirely on the proposition that:

> "... a government investigative technique, such as

> a dog sniff or chemical test, that discloses only the presence or absence of narcotics, and does not expose non-contraband items, activity or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and is thus not a 'search' for Fourth Amendment purposes." 93 S.W.3d at 346.

Porter was erroneously cited as controlling. In this case, the State has never contended that Rocky's alert discloses "only the presence or absence of narcotics." The Affiant claimed that Rocky's alert indicates the presence of the *odor* of a controlled substance. The "sniff of what's inside a home" implicates the Fourth because there is a legitimate expectation of privacy in odors of unknown origin and duration that are inside a home just as much as there is a privacy interest in the sources of residential heat.

3. The Fourth Amendment does not turn upon the presence or absence of a physical intrusion into any given enclosure. *See Katz v. United States*, 389 U.S. 347 (1967). Both the Fifth and Ninth Circuit Courts of Appeals have observed that if a drug-dog sniff infringes reasonable expectations of privacy, it will constitute a search. *See United States v. Reyes*, 349 F.3d 219, 223-24 (5th Cir. 2003); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1266 (9th Cir. 1999). Our Fourth Amendment jurisprudence says the Fourth Amendment guarantees and

protects a privacy interest in the places and persons where contraband may be possessed. Everything inside a home, including recent and residual odors, and sources of heat and light, is protected; everything but the actual contraband is protected. The home may not be unlawfully invaded even where the object is the beneficial seizure of contraband. As will be shown herein, the unfettered use of dogs without any evidentiary guidelines is jeopardizing this Constitutional right to be free from unreasonable and abusive intrusions.

4. The use of a drug-sniffing dog at the door of a private home, to perform an olfactory observation of the contents, is an issue of Constitutional significance which affects the privacy rights of all citizens. It is an expansion of law enforcement techniques which erode the right of a citizen to seek refuge in his home from unreasonable governmental intrusion. The tool of the search, like a heat seeking device, is only available to law enforcement. The State court would allow groups of officers to go door-to-door through residential neighborhoods, without warrants, gathering evidence amounting to "probable cause," based on the scratching or barking of a dog even when the dog has not been trained, tested or certified by any governmental agency other than a single uniformed officer.

5. There is an unfortunate trend in recent case law

which assumes that when the police testify to use of a "drug detection dog," the dog's "alert" shows the unlawful presence of a controlled substance in proximity to the dog. This is fiction. The contention that the "alert" is proof that contraband is present was not presented by the State in the trial court or in the State appeal. This contention is a myth reiterated by the Courts of Texas to reach the desired result.

6. Certiorari should also be granted in this case because:

a. The legal reasoning of the Texas Court of Appeals opinion in fundamentally flawed, and conflicts with the relevant decisions of this Honorable Court in *Kyllo v. United States,* 533 U.S. 27 (2001). *Kyllo* is consistent with and supported by well-established Constitutional principles also articulated in *Dow Chemical Co. v. United States,* 476 U.S. 227 (1986); *Payton v. New York,* 445 U.S. 573 (1980); and *Katz v. United States,* 389 U.S. 347 (1967);

b. The opinion conflicts with the post-*Kyllo* opinion of the United States District Court in *United States v. Jackson,* 2004 WL 1784756 (S.D. Ind. 2004) (Appendix D);

c. The opinion conflicts with the Second Circuit Court of Appeals in *United States v. Thomas,* 757 F.2d 1359 (2d Cir. 1985);

d. The opinion conflicts with the conclusion

reached by the state supreme court of Nebraska in *State v. Ortiz,* 600 N.W. 2d 805 (Neb. 1999);

e. The opinion conflicts with the Court of Appeals of Washington in *State v. Dearman,* 962 P.2d 850 (Wash. App. Div. 1 1998);

f. This Honorable Court also needs to provide "Constitutional guidelines for the reliability of sniff searches" (*Stauffer,* id.) in order to protect the "right of the people to be secure in their . . . houses" in the context of the ever expanding use of dog sniff. Otherwise, as here, the unregulated use of dogs that are not trained, tested or certified by any objective criteria is a tool which the government can use to bypass the requirements of the Fourth Amendment.

I. THE WARRANTLESS USE OF A DOG SNIFF AT THE DOOR OF A PRIVATE HOME CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. THE REASONING AND HOLDING OF *KYLLO V. UNITED STATES*, 533 U.S. 27 (2001) APPLIES TO THE WARRANTLESS USE OF A DRUG-SNIFFING DOG AT THE DOOR OF A PRIVATE HOME.

For brevity, these points will be argued together.

A. Generally.

In theory, a drug-sniffing dog permits the police to

detect information that is undetectable by the ordinary use of human senses. These dogs are tools uniquely and exclusively available to law enforcement because the possession and use of controlled substances is essential to their conditioning. The State contends that drug-sniffing dogs detect the odors of substances, including illegal drugs, that are beyond the ability of the human sense of smell.

This drug-sniffing dog was able, based on an external examination, to react to the presence of the odor of contraband inside closed containers hidden in rooms or automobiles with a high degree of frequency, sometimes, according to his records, he erred. These odors could not be detected by humans without the aid of the dog. Contraband may or may not be present; the dog is trained to "alert" on the odor. However, the dog cannot tell anyone, even his trained handler, what specifically caused the alert, or failure to alert, nor when the odor was there or how it arrived. Foose testified that a good dog may "alert" to the odor of marijuana a year after it has been removed from the place of the alert.

Hence, the use of a drug-sniffling dog at the entrance of a private home gathers invisible and ambiguous information coming from the interior of the home, or located on the exterior, or blown by the wind, and sometimes there is nothing there. The better the dog, the

more "scientifically reliable" is his alert. A police dog's sniff at the entrance of a home, to detect the presence of odors at a place removed from human perception, is logically undistinguishable from the information gathering recently disapproved of in *Kyllo v. United States,* 533 U.S. 27, at 34 (2001). They are both sense-enhancing devices, available only to law enforcement, and permit ambiguous information from the interior of a home be gathered that could not otherwise be obtained without physical "intrusion into a constitutionally protected area". *Kyllo,* 533 U.S. at 34.

In *Kyllo*, this Court recognized that personal security in the home is guaranteed by the Fourth Amendment. The Texas opinion directly conflicts with repeated pronouncements from this Court that the home is a place of special constitutional stature, and a refuge for every citizen.

> ... it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people. Security of the home must be guarded by the law in a world where privacy is diminished by enhanced surveillance....

Minnesota v. Carter, 525 U.S. 836, (1999) (Kennedy, J. concurring). *See also Segura v. United States,* 468 U.S. 796, 810 (1984) (The sanctity of the home is not to be disputed because of the privacy interests in the activities that take place within.); *Silverman v. United States,* 365

U.S. 505, 511 (1961)(At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and be free from unreasonable government intrusion.).

B. The Texas Court Of Appeals Holding On This Important Federal Question Conflicts with the Decisions Of This Court.

In *Kyllo* at 40, this Court holds that where the government uses a device that is not in general pubic use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search" and is presumptively unreasonable without a warrant. In arriving at this holding this Court reiterated that a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. *See Katz v. United States,* 389 U.S. 347, 361 (1967). It is well-settled Constitutional law that privacy expectations are most heightened in areas immediately adjacent to a private home. *See Dow Chemical Co. v. United States,* 476 U.S. 227, 237 n.4 (1986).

The Texas cases improperly confuse the presence of an odor with the presence of a substance. The Affiant in this case drew this distinction, but the Court of Appeals did not. Even a perfect dog does not show the presence of narcotics,

only the presence of an odor on which he was trained or is familiar – the dog does not know when, what, or why, or how, the odor got there. This particular dog was "certified" on a lawful, controlled substance, amphetamine, often prescribed for children and adults. Rocky was not even "certified" on the target substance, methamphetamine.

In finding that law enforcement's use of the drug-sniffing dog "compromise[d] no legitimate privacy interest and [was] thus not a 'search' for Fourth Amendment purposes" the *Porter* opinion by the Texas Court of Appeals also misapplies *City of Indianapolis v. Edmund,* 531 U.S. 32 (2000); *United States v. Jacobson*, 466 U.S. 109 (1984); and *United States v. Place*, 462 U.S. 696 (1983). Each of these cases involved use of a drug-sniffing dog to sniff a closed container in a public or common area and at a time the container is in transit and it is impractical to obtain a warrant. The *Place* doctrine applies to public places, not the home.

The Texas court gave no acknowledgment to the "sanctity" of the home where a "heightened expectation of privacy" is enjoyed by those in their homes. *See Oliver v. United States,* 466 U.S. 170, 178 (1984)(*citing Payton v. New York,* 455 U.S. 573, 601 (1980)).

The entire interior of a home is Constitutionally protected from prying government eyes. *Kyllo* at 37. The

conducting of affairs inside one's home, shielded from public scrutiny, are certainly the "details" the police wish to explore when the investigators go at 3:30 a.m. to the front door of a house or garage, choosing their time and manner to avoid detection.

The Fourth Amendment draws "a firm line at the entrance to the house." *Payton,* 455 U.S. at 590. A drug-dog sniff at the entrance which seeks evidence of what could be inside crosses the line of protection guaranteed by the Fourth Amendment. This Court should grant certiorari to determine if the holding and reasoning of *Kyllo* should be extended to the "sense-enhancing" use of a drug-sniffing police dog at the doorstep of a private home.

C. The Opinion Conflicts With The Decisions Of Other Federal And State Courts By Holding The Drug-Dog Sniff Was Not A Search Governed By the Fourth Amendment.

In *United States v. Jackson,* 2004 WL 1784756 (S.D. Ind. 2004) (Appendix D), the court granted a motion to suppress after ruling that law enforcement's use of a dog to sniff the door of a house was a warrantless search. The court found that use of a drug-sniffing dog at the entrance of a home indistinguishable from the police use of a thermal-imaging device outside of a home to scan the interior of that home in *Kyllo v. United States.* The court

quoted this passage from Justice Scalia's opinion in *Kyllo*, p. 2, lines 4:

> "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search - - at least where (as here) the technology in question is not in general public use." 533 U.S. at 34, quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)."

The *Jackson* court concludes that the reasoning in *Kyllo* regarding the "sense-enhancing technology" of a thermal imaging device applied directly to the "sense-enhancing" use of a specially trained dog. The *Jackson* court further noted that only police use dogs to detect drugs, not the general public, thus, such dogs are not in "general public use". Finally, the *Jackson* court saw "no constitutional distinction between the use of specially trained dogs and sophisticated electronics from outside a home to detect activities in or contents of the home's interior". Use of such a dog would be akin to use of a mechanical device that analyzes the odors or scents emanating from the interior of the home.

The *Jackson* court also paused to observe that a "dog alert" as interpreted by the handler, is no guarantee that controlled substances are unlawfully present:

> Under the government's theory in this case, the police would be free to walk drug-sniffing dogs from door to door through a neighborhood, and to obtain a search warrant for any home where the dog indicated an odor of a controlled substance. And of course, a top-to-bottom search of a home for controlled substances, which can be concealed almost anywhere, can be an extremely thorough intrusion into a home. When one keeps in mind the fact that the police reported that the dog in question here alerted to a vehicle and the home, and that both were searched without finding a trace of controlled substances, the potential for abusive and unreasonable searches is especially evident. (*Jackson*, Appendix D., p. 5)

In *United States v. Thomas,* 757 F.2d 1359, 1366 (2d Cir. 1985) the court addressed the complaint that a canine sniff outside the defendant's apartment was an illegal warrantless search. Citing *Katz v. United States, supra,* the court observed that the question to be asked was whether the use of a trained dog intrudes on a legitimate expectation of privacy. *Id.* The court found the defendant had a legitimate expectation that the contents of his closed apartment would remain private, and that use of the trained dog impermissibly intruded on that legitimate expectation. 757 F.2d at 1367. The court held that because of the defendant's heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search. *Id.*

The Fifth and Ninth Circuit Courts of Appeals have observed that if a drug-dog sniff infringes reasonable expectations of privacy it will constitute a search. *See United States v. Reyes*, 349 F.3d 219, 223-24 (5th Cir. 2003); *B.C. v. Plumas Certified School District*, 192 F.3d 1260, 1266 (9th Cir. 1999).

The Supreme Court of Nebraska has addressed whether the use of a canine to sniff at the threshold of a residence was a search governed by the Fourth Amendment. *State v. Ortiz,* 600 N.W.2d 805 (Neb. 1999). In guiding their review the court observed:

> "The Fourth Amendment embodies the centuries-old principle of respect for the privacy of the home. [citation omitted]. The right to be free from unreasonable searches and seizures of the home is substantial, and it has been said to be the 'chief evil against which the working of the Fourth Amendment is directed.'" *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984)(quoting *United States v. United States District Court*, 407 U.S. 297 (1972).

Additionally the *Ortiz* court quoted this Court in recognizing:

> "We cannot forgive the requirements of the Fourth Amendment in the name of law enforcement [and] it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home…are invaded." *Berger v. New York,* 388 U.S. 41, 62-63 (1967).

The *Ortiz* court held a canine sniff for illegal drugs conducted at the threshold of a dwelling detects information regarding the contents inside the home, and an individual has a legitimate expectation inside the home even as to these "unworthy" contents. 600 N.W.2d at 823. Therefore, the canine sniff constituted a search under the Fourth Amendment. *Id.*

In *State v. Dearman,* 962 P.2d 850, 854 (Wash. App. Div. 1 1998), the Washington Court of Appeals held that the use of a narcotics dog to detect whether marijuana was growing in the defendant's garage constituted a "search" requiring a search warrant. The court reasoned that the home receives heightened protection and is treated as a highly private place that can be unconstitutionally "invaded" even through there is no physical intrusion into the house. 962 P.2d at 852-853. Like an infrared thermal detection device, use of a drug-sniffing dog effectively allows law enforcement to "see through the walls of the home." *Id.*

Given that the opinion of the Texas Court of Appeals directly conflicts with other Federal and State courts' opinions on a Constitutional issue of importance to both law enforcement and the general public, this Court should grant certiorari to resolve the conflict.

CONCLUSION

The use of Rocky in this case shows great abuse of Petitioner's Constitutional rights. The Texas Court of Appeals relied on a theory unsupported by the evidence and never urged by the State. The Texas Court invited this Court to establish guidelines for the Constitutional use of "dog sniff evidence." Police should not be permitted to walk drug-sniffing dogs of uncertain reliability from door to door through neighborhoods, obtaining a warrant for a comprehensive search of every home where the handler sees his dog "alert". These tactics violate the very core of the Fourth Amendment's protection of the home from government intrusion and are contrary to the generally accepted Constitutional principle that, in America, people are free from warrantless police intrusion into their homes and private lives.

For these reasons, it is respectfully prayed that Honorable Court grant the petition for writ of certiorari, reverse the judgment of the Texas Court of Appeals for the Fourteenth Supreme Judicial District; and remand the cause for further proceedings consistent with the Court's opinion.

Respectfully Submitted,

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Dated December 15, 2004.

APPENDIX

OPINION
Do Not Publish Tex. R. App. P. 47.2(b)

Court of Appeals of Texas,
Houston (14th Dist.).

Kristian Lehr STAUFFER, Appellant
V.
The STATE of Texas, Appellee.

No. 14-03-00193-CR.

Feb. 12, 2004.
Petition for Discretionary Review Refused Sept. 29, 2004.

Background: Defendant pleaded guilty in the 183rd District Court, Harris County, to possession with intent to deliver a controlled substance. Defendant appealed.

Holding: The Court of Appeals, Adele Hedges, J., held that information that dog which conducted sniff search was a certified narcotics detection dog and was trained to detect the odor of marijuana, cocaine, methamphetamine, and heroin constituted a substantial basis for issuance of a warrant.
Affirmed.

On Appeal from the 183rd District Court, Harris County, Texas, Trial Court Cause No. 903,135.

Kent A. Schaffer and Edward A. Mallett, for Kristian Lehr Stauffer.

Carol M. Cameron, for State of Texas.

Panel consists of Chief Justice HEDGES and Justices

ANDERSON and SEYMORE.

Opinion

ADELE HEDGES, Chief Justice.

Appellant Kristian Lehr Stauffer appeals from the trial court's denial of her motion to suppress evidence obtained from a search of her residence on October 4, 2000. Following the denial of her motion, appellant waived a jury and entered a plea of guilty to the charged offense of possession with intent to deliver a controlled substance, namely methamphetamine. The trial court deferred adjudication of appellant's guilt, and she was placed under community supervision for ten years and fined $25,000 dollars.

Appellant raises essentially two issues in connection with the trial court's denial of her motion to suppress: (1) whether the "dog sniff" of her residence was legal, and (2) whether the search warrant was invalid because the affidavit supporting probable cause contained falsehoods, misrepresentations, and omissions. Before addressing these issues, however, we consider two issues presented by the State for review: (1) whether appellant waived her right to appeal by pleading guilty, and (2) whether appellant's state constitutional claims present nothing for review.
We affirm.

The State's Issues

[1] First, the State, citing *Young v. State*, 8 S.W.3d 656, 666-67 (Tex.Crim.App.2000), argues that a valid guilty plea waives the right to appeal a claim of error when the judgment of guilt was rendered independent of, and not supported by, the error. Even if a defendant initially waives the right to appeal, (s)he is not prevented from

appealing if the trial court consents. *Montreal v. State*, 99 S.W.3d 615, 617 (Tex.Crim.App.2003). The record reflects that the trial court here certified appellant's right to appeal. Therefore, the State's first issue is without merit.

Second, the State argues that appellant's state constitutional claims are inadequately briefed because she failed to provide any argument or authority regarding how the protections under the Texas Constitution differ from those under the United States Constitution. Thus, it argues, her state constitutional claims are not properly presented for review. *See Ex parte Fierro*, 79 S.W.3d 54, 61 n.4 (Tex.Crim.App.2002). While no such analysis appears concerning the legality of the dog sniff, we find appellant's discussion concerning the alleged inaccuracies in the affidavit to be adequately briefed. We therefore will consider below appellant's state constitutional claims with respect to her contentions regarding the alleged falsehoods, misrepresentations, and omissions in the affidavit.

The Legality of the Dog Sniff

In the first five issues, appellant argues that the trial court erred in not finding that the sniff conducted by Deputy Preston Foose of the Harris County Sheriff's Department with his drug-detection dog, Rocky, was an unlawful search. We review a motion to suppress ruling for abuse of discretion. *Balentine v. State*, 71 S.W.3d 763, 768 (Tex.Crim.App.2002). We view the evidence in the light most favorable to the ruling, and give almost total deference to the trial court's determination of historical facts which the record supports, especially when factual findings are based on credibility and demeanor. *Id.* We review *de novo* the trial court's application of law to facts. *Id.*

[2] First, appellant contends that the officer's entry onto her

property was unlawful, citing *Bower v. State*, 769 S.W.2d 887, 897 (Tex.Crim.App.1989), apparently for the proposition that an officer entering the property *must* have an "honest intent of asking questions of the occupant there." But an officer's subjective motivations will never invalidate objectively justifiable behavior under the Fourth Amendment. *Walter v. State*, 28 U.S.3d 538, 542 (Tex.Crim.App.2000). Subjective intentions play no role in ordinary probable0cause analysis under the Fourth Amendment. *Id.* Appellant's first contention is therefore without merit.

Second, appellant contends that she had a legitimate expectation of privacy within the confines of her own property, citing *inter alia, United States v. Thomas*, 757 F.2d 1359, 1366-67 (2d Cir. 1985), *cert. denied*, 474 U.S. 818 (1986), and *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.3d 94 (2001). This Court, however, has already considered and rejected a similar argument advanced in *Porter v. State*, 93 S.W.3d 342, 346-47 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd). For the reasons state therein, we hold that appellant's second contention is without merit.

[3] Third, appellant contends that the trial court erred in not finding that the drug-detection dog, Rocky, was insufficiently qualified to perform the sniff of the areas immediately outside appellant's residence. We have previously noted that the United States Supreme Court "has failed to establish guidelines for the reliability of 'sniff' searches ...". *See Josey v. State*, 981 S.W.2d 831, 845 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd). The Fifth Circuit, however, has addressed the reliability issue on several occasions. *See, e.g., United States v. Daniel*, 982 F.2d 146 (5th Cir. 1993); *United States v. Williams*, 69 F.3d 27 (5th Cir.1995), *cert. denied*, 516 U.S. 1182, 116 S.Ct. 1284, 134 L.Ed.3d 229 (1996); *United States v. Gonzales*,

79 F.3d 413 (5th Cir.1996); *United States v. Sanchez-Pena*, 336 F.3d 431 (5th Cir.2003). Citing *Daniel*, the *Williams* court held a showing of the dog's training and reliability is not required. 69 F.3d at 28.

The affidavit in this case recites the following:

> On October 4, 2000, I spoke with P. Foose, a peace officer employed by the Harris County Sheriff's Department as a narcotics dog handler. He stated that his canine partner is Rocky. He is a certified narcotics dog handler and Rocky is a certified narcotics detection dog and the Texas K-9 Police Association certifies them both. Rocky is trained to detect the odor of marijuana, cocaine, methamphetamine, and heroin.

Under *Daniel*, this information clearly constitutes a substantial basis for the issuance of a warrant. *See* 982 F.2d at 151-52.

Appellant also challenges the adequacy of Rocky's training and questions whether the dog was reliable enough to make an effective alert. She contends that Rocky was not certified by any governmental entity, was not trained to alert only on unlawful substances, and was unable to distinguish methamphetamine from amphetamine. Because Rocky's certification is a determination of historical fact supported by the record, we defer to the finding made by the trial court. *See Balentine*, 71 S.W.3d at 768.

[4] Our sister court has previously held that because there is no reasonable expectation of privacy under these circumstances, an alert by a drug-detection dog outside a person's residence is sufficient to provide probable cause to search the site. *Rodriquez v. State*, 106 S.W.3d 224, 229 (Tex.App.- Houston [1st Dist.] 2003, pet. ref'd). In the present case, Rocky alerted outside the garage area of the

home, thereby providing probable cause to search [FN1]

> FN1. Because appellant does not challenge the scope of the search on appeal, we do not address that issue here.

Accordingly, we overrule appellant's issues one through five.

The Alleged Falsehoods, Misrepresentations, and Omissions

In issues six through nine, appellant argues that the search warrant was invalid because the affidavit supporting probable cause contained falsehoods, misrepresentations, and omissions. The Court of Criminal Appeals has stated that "the inclusion of tainted allegations in an affidavit does not necessarily render a resulting search warrant invalid." *Castillo v. State*, 818 S.W.2d 803, 805 (Tex.Crim.App.1991). We must set aside the tainted allegations and determine whether the independently – and lawfully – acquired information in the affidavit clearly establishes probable cause. *Id.* If, based on the untainted information in the affidavit, the search warrant would have nonetheless been issued, then the warrant is valid. *Id.*

In the present case, we have already determined probable cause existed to search the premises. Appellant even concedes that the results of the dog sniff link the drugs to her residence. Since the results were legally obtained and included in the affidavit, the search warrant could have been issued on that basis alone. We therefore find it unnecessary to consider the arguments raised by appellant concerning the alleged falsehoods, misrepresentations, and omissions in the affidavit. Accordingly, we overrule appellant's issues six through nine.

Conclusion

The trial court did not err in denying appellant's motion to suppress. The judgment is affirmed.

2004 WL 253520 (Tex.App.-Hous. (14 Dist.))

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

09/29/04
COA#: 14-03-00193-CR
RE: Case No. PD-0401-04
STYLE: STAUFFER, KRISTIAN LEHR

ON THIS DAY, THE APPELLANT'S PETITION FOR DISCRETIONARY REVIEW HAS BEEN REFUSED.

TROY C. BENNETT, JR.

MANDATE

The Fourteenth Court of Appeals

NO. 14-03-00193-CR

KRISTIAN LEHR STAUFFER, Appellant
V.
THE STATE OF TEXAS, Appellee

Appeal from the 183rd District Court of Harris County. (Tr. Ct. No. 903,135). Opinion delivered by Chief Justice Hedges. Justices Anderson and Seymore also participating.

TO THE 183RD DISTRICT COURT OF HARRIS COUNTY, GREETINGS:

Before our Court of Appeals, on the 12th day of February A.D. 2004, the cause upon appeal to revise or reverse your judgment was determined. Our Court of Appeals made its order in these words:

> This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things have it duly recognized, obeyed, and executed.

WITNESS, the Hon. Adele Hedges, Chief Justice of our Fourteen Court of Appeals, with the Seal thereof affixed, at the City of Houston, November 17, 2004.

ED WELLS, Clerk
By "s/_____"

COURT OF APPEALS
OF THE STATE OF TEXAS

Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana, Indianapolis Division.

UNITED STATES OF AMERICA, Plaintiff,
V.
Larry D. Jackson, Defendant.

No. IP 03-79-CR-1H/F.

Feb. 2, 2004.

J P Hanlon, Assistant United States Attorney, Indianapolis, IN, for Plaintiff.

ENTRY ON DEFENDANT'S MOTION TO SUPPRESS

A federal grand jury indicted defendant Larry Jackson under 18 U.S.C. § 922(g)(1) on two counts of unlawful possession of fifteen firearms and ninety-two rounds of ammunition by a person with a prior felony conviction. The two counts stem from two different searches of Jackson's residence at 6050 East 32nd Street in Indianapolis. Both searches were carried out pursuant to search warrants. The first search was on February 17, 2002. The second was more than a year later, on March 4, 2003.

Jackson has moved to suppress the evidence against him, arguing that both searches violated his Fourth Amendment rights. After the court heard evidence, the parties filed post-hearing briefs. Pursuant to Rule 12(d) of the Federal Rules of Criminal Procedure, the court now states its findings of fact and conclusions of law. As explained below, the court grants the motion to suppress as to

evidence from the first search. Based on the reasoning of *Kyllo v. United States*, 533 U.S. 27 (2001), the first search warrant was obtained with information obtained through a warrantless and unconstitutional search when police officers used a drug-sniffing dog at the door of Jackson's home to enhance their ability to find out what was inside the home. The court denies the motion with respect to evidence from the second search.

I. The February 17, 2002 Search

On February 17, 2002, Indiana State Police officers and Miami County sheriff's deputies were conducting surveillance of one Corey Mack pursuant to a drug-related arrest warrant. A confidential informant had told the officers that Mack regularly dealt marijuana at the Kokomo YMCA on Sundays where he also played basketball. The officers were watching Mack to try to learn where he was getting the marijuana and who else was involved.

On February 17th, the officers watched Mack leave his Indianapolis home, stop at two apartment complexes in Indianapolis, and pick up someone at the airport. According to Indiana State Police Detective Brian Elmore, Mack eventually returned to his home. There the officers observed him carrying bags in and out of the house. Mack then left his home and arrived at the 6050 East 32nd Street residence of defendant Larry Jackson in Indianapolis. The officers knew that the home was not Mack's home. They had planned to follow Mack to Kokomo and to arrest him there, but over the course of the day they changed their minds. The officers arrested Mack as soon as he drove into the driveway of Jackson's residence, before he could enter the house. While Mack was in the custody outside the house, he explained to the officers that he was there to pick up a friend from the house to take him to Kokomo.

The officers then approached the Jackson residence. Detective Elmore testified that he spoke with Anderson Jackson, who is the younger brother of Larry Jackson. Anderson told the officers that he lived at 6050 East 32nd Street with his brother Larry and Larry's girlfriend. A check of Anderson's record showed that he was wanted on an open warrant in Huntington County, and the officers arrested him. The police also asked all other occupants of the house (including several men working on a remodeling project for Larry Jackson) to step outside to speak with the officers, and they did so.

Detective Mike Morris of the Indiana State Police Department came to the residence at some point after Mack had been arrested. Detective Morris led his drug-sniffing dog around the premises, including around the vehicles that were parked there, and around the exterior of the residence. The dog indicated for drugs on a truck parked in the driveway of the house, identified as belonging to someone other than Larry Jackson. Outside the back door of the residence, the dog also gave an indication for drugs.

Detective Elmore then asked Larry Jackson to consent to a police search of the house. Initially, Jackson refused to allow the officers to search his home. When Detective Elmore stated that he would get a search warrant, Jackson agreed to allow certain portions of the house to be searched. When Elmore told Jackson that such limits were unacceptable, Jackson again refused permission for any search.

Based on the above facts, officers prepared a probable cause affidavit for a warrant to search the home. The affidavit focused on the dog's signal at the back door. The affidavit also noted that Jackson had been willing to allow a limited search of the home but had changed his mind when the officer said a complete search would be needed. A

magistrate of the Marion Superior Court issued a search warrant for Jackson's home. The search warrant authorized a search for "[a]ny and all controlled substances. Items used for the sale, distribution, cultivation and manufacturing of controlled substances. Monies derived from the sale and distribution of controlled substances. Receipts and ledgers used in the sale and distribution of controlled substances.

The officers' search of Jackson's residence did not produce any controlled substances or other items related to drug distribution or manufacturing within the scope of the search warrant. But the officers found eight handguns, one semi-automatic rifle, one rifle, and two shotguns. Those items were seized and are the subject of count one of the superseding indictment. The police also searched the vehicle on which the dog alerted. Again they found no drugs or evidence of drugs.

The court grants the motion to suppress the firearms seized in the February 17, 2002 search because the critical information needed to support the warrant – the dog's signal at the back door of the residence – was obtained in a search that violated the Fourth Amendment.

After the police officers arrested Mack outside the Jackson home, they did not need probable cause to approach the home and to ask to talk to the occupants. This "knock and talk" technique is a permissible police procedure that does not require probable cause or even reasonable suspicion. See *United States v. Johnson*, 170 F.3d 708, 711 (7th Cir.1999)(discussing "knock and talk" technique and affirming district court's grant of motion to suppress for different reasons). The police officers did not have either probable cause or reasonable suspicion as they approached Larry Jackson's residence. Mack had told them he was going to Jackson's residence to pick up a friend, but

nothing more. When the officers then knocked on the door to 6050 East 32nd Street, they were operating under a generalized suspicion of wrongdoing, not sufficient without consent or exigent circumstances, to search the home. They certainly did not have information sufficient to support a search warrant for the residence.

Any person would have been free to walk up to the door of Jackson's home and ring the doorbell. Any person could also have been denied entry to the residence, lawfully, just as Jackson here lawfully refused police entry and refused to consent to a search. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991)("a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); see also, *e.g., United States v. Hyppolite*, 65 F.3d 1151, 1157 (4th Cir.1995)(explaining that probable cause cannot be based on assertion of right to refuse consent to a search); *United States v. Prescott*, 581 F.2d 1343, 1350-52 (9th Cir.1978)(conviction as accessory after the fact for concealing fugitive reversed where conviction was based on evidence that defendant refused to allow police entry into his home without a warrant). The fact that Jackson refused to consent to a search could not support the application for a search warrant.

The search warrant for the residence could not have been issued without the information that a drug-sniffing dog had alerted at the back door of the residence. Apart from that information, the officers knew only that a drug suspect, Corey Mack, had intended to pick up another person at the residence. [FN1]

> FN1. The probable cause affidavit provided only minimal information about the reliability of the dog in question. The affidavit said only that the dog had been "certified through the National Narcotics Detective Dog Association," and that in the past

> two and a half years, the dog had discovered approximately 750 pounds of marijuana, three pounds of methamphetamines, seven pounds of cocaine, and more than $100,000 in currency. The affidavit provided no information about any false positive alerts, and that silence leaves room to question whether such an incomplete report about the dog's reliability was sufficient to support probable cause. See generally *United States v. Limares*, 269 F.3d 794, 797-98 (7th Cir.2001)(upholding search based on affidavit that dog was reliable where later evidentiary hearing showed dog had only seven percent false positive alerts); *United States v. Adams*, 26 F.3d 702, 705 n. 5 (7th Cir. 1994)(noting need to show a drug-sniffing dog's reliability); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir.1980)(finding probable cause affidavit sufficient where affiant told judge that dog had been trained and had :proven reliable" on prior occasions). Because the magistrate judge accepted the information about Detective Miller's drug-sniffing dog as sufficient for probable cause, however, the good faith exception to the exclusionary rule would bar suppression of the evidence on a theory that the affidavit failed to establish the dog's reliability.

Jackson contends that the use of the dog to sniff the back door of his house amounted to an unreasonable and warrantless search, so that the foundation for the search warrant was obtained by violating his Fourth Amendment rights. The court agrees. The use of a drug-sniffing dog at the entrance of a home in this case is comparable to police use of a thermal-imaging device outside a home to scan the interior of that home in *Kyllo v. United States*, 533 U.S. 27, 34 (2001), which was held to be a search of the home in question.

The issue in *Kyllo* was whether the results of a thermal image of a suspect's home could be used to support an application for a search warrant. The thermal imaging device was used from a police car on a public street in front of the residence in question. The police were entitled to be there on the street and to observe the residence from that location. The Supreme Court concluded, however, that the police could not use the "sense-enhancing technology" to learn more about what was inside the residence. Justice Scalia wrote for the Court: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise be obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search – at least where (as here) the technology in question is not in general public use." 533 U.S. at 34, quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961).

This reasoning applies directly to the "sense-enhancing" use of a specially trained dog. Dogs with such training are not in "general public use" (which refers to the general public, not to police forces, which often use such dogs to detect drugs). The information such a dog can provide about the interior of the home would not otherwise be obtained without a physical intrusion into the home. The court sees no constitutional distinction between the use of specially trained dogs and sophisticated electronics from outside a home to detect activities in or contents of the home's interior.

The government cites *United States v. Ganser*, 315 F.3d 839 (7th Cir.2003), and *United States v. Vasquez*, 909 F.2d 235 (7th Cir.1990), for the proposition that normally, a "search" by a drug-sniffing dog is not legally a "search" at all. The situations in those cases are distinctly different from the situation in this case.

First, in *Ganser*, the Seventh Circuit held that the canine sniff of a piece of mail intercepted in transit to its intended recipient was permissible under the Fourth Amendment. The *Ganser* court noted that the Fourth Amendment allows police who have a reasonable suspicion that a mailed item is contraband to detain the item briefly for further investigation. 315 F.3d at 843. Mail, like airline luggage, passes through the hands of many different people, and reasonable suspicion can support the use of a drug-sniffing dog as part of a brief detention. Accord, *United States v. Place*, 462 U.S. 696, 707 (1983)(holding that dog sniff of airline luggage already in a public place was not a search within scope of Fourth Amendment).

Luggage and mail are moveable objects within which the owner transports items that, at any time if opened by the carrier, may be exposed to the plain view of a bystander. See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000)("Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is much less intrusive than a typical search."). The same is not true of a home, which is at the core of the Fourth Amendment guarantee that the "right of the people to be secure in their ... houses ... against unreasonable searches and seizures, shall not be violated." As the Supreme Court wrote in *Payton v. New York*: "That language unequivocally establishes the proposition that '[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" 445 U.S. 573, 589-90 (1980), quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961). The privacy interest a person maintains in a home is more substantial than the privacy interest in personal luggage while traveling on public carriers or in an automobile. And in *Place*, the Supreme Court specifically noted that the sniffed luggage was located in a public place. 462 U.S. at 707. There is nothing about the back door to a

private residence that qualifies as a similarly "public place," even though the police officers themselves had a right to stand at the door, to knock, and to talk with anyone who came to the door.

In *Vasquez*, the other dog-sniff case cited by the government here, the Seventh Circuit held that a dog sniff of a detached garage adjoining a public alley and located in an otherwise vacant lot was not a search. That case is distinguishable from the present case because of the reduced expectation of privacy in a detached garage in a vacant lot, and the court limited its holding. See 909 F.2d at 238 ("the trial court correctly ruled that subjecting the garage to a 'sniff-test' from a public alley was not a warrantless search. We do not reach the issue of whether a showing of 'reasonable suspicion' is necessary to initiate a dog sniff search that is more intrusive and that exposes private information other than the presence of contraband."). Moreover, even if *Vasquez* were deemed to allow the police to bring drug-sniffing dogs to the doors of private residences as part of their investigations, such an extension of that 1990 decision would not be consistent with the Supreme Court's 2001 decision in *Kyllo* holding that use of a thermal imaging device outside a home was a search of the home subject to the Fourth Amendment.

None of the cases cited by the government hold that a canine sniff of the exterior of a home is not a search. In fact, the Second Circuit in *United States v. Thomas*, 757 S.W.2d 1359, 1366-67 (2d Cir.1985), held that police use of a drug-sniffing dog at the door of a suspect's residence was a search that required probable cause and a search warrant. The Second Circuit distinguished *Place*, noting that the canine sniff in *Place* had occurred in a public place, an airport. In *Thomas* the police were attempting to obtain information about the contents of a suspect's home. "The defendant had a legitimate expectation that the contents of

his closed apartment would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation." *Thomas*, 757 F.2d at 1367.

Thomas is squarely on point on this issue. Just as in *Thomas*, the police in this case were attempting to intrude on the privacy of Jackson's home, where Fourth Amendment protections "are at their peak." *United States v. Hardy,* 855 F.2d 753, 759 n. 10 (11th Cir.1988), citing *Payton v. New York*, 445 U.S. 573, 589 (1980); see also *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir.1990)(canine sniffs of vehicles were not searches where dog did not invade home or "bodily integrity."). [FN2]

> FN2. *Thomas* has been criticized by courts as not consistent with *Place*, but those courts criticizing *Thomas* did not have the benefit of the 2001 decision in *Kyllo* regarding the use of "sense-enhancing" technology outside a private residence. Moreover, the federal cases criticizing *Thomas* that this court has found did not concern dog sniffs of entrances to private residences. See *United States v. Reed,* 141 F.3d 644, 650 (6th Cir.1998)(canine team was already lawfully inside apartment by consent, and "sniff" was not further search); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir.1993)(sniff of commercial warehouse from outside was not a search); *United States v. Colyer*, 878 F.2d 469, 475-76 (D.C.Cir.1989)(sniff of railroad "sleeper" compartment by dog in public corridor was not a search). The Seventh Circuit has not addressed *Thomas* on this issue.

Under the government's theory in this case, the police would be free to walk drug-sniffing dogs from door to door through a neighborhood, and to obtain a search warrant for

any home where the dog indicated an odor of a controlled substance. And of course, a top-to-bottom search of a home for controlled substances, which can be concealed almost anywhere, can be an extremely thorough intrusion into a home. When one keeps in mind the fact that the police reported that the dog in question here alerted to a vehicle and the home, and that both were searched without finding a trace of controlled substances, the potential for abusive and unreasonable searches is especially evident. See also *Doe v. Renfrow*, 635 F.2d 582, 584 (7th Cir.1980)(Fairchild, C.J., dissenting from denial of rehearing *en banc*)(dogs that sniffed thousands of high school students alerted on 50, of whom only 15 had contraband). Because the issuance of the search warrant depended on information the police had gathered by violating the Fourth Amendment, the search warrant was invalid and the evidence obtained from the February 17, 2002 search must be suppressed. [FN3]

> FN3. The Second Circuit in *Thomas* held that, without the evidence of the dog sniff, the evidence presented to the magistrate did not support a finding of probable cause. The court then held that the good faith exception to the exclusionary rule applied to the fruits of the search because the magistrate had approved of the use of the information from the dog sniff to secure the warrant. 757 F.2d at 1368. This portion of *Thomas* appears to be an improper application of the good faith exception, which does not apply to evidence obtained without a warrant and in violation of the Fourth Amendment. The Fourth Amendment and exclusionary rule would do little to discourage police violations if the police were free to violate the Fourth Amendment and then, without consequence, use illegally obtained evidence to obtain a search warrant. When the police apply for

> a search warrant, the job of the magistrate is to determine whether the evidence shows probable cause for the search, not to investigate whether all the evidence presented was obtained in a constitutional manner. The magistrate's later decision to issue a search warrant cannot insulate the earlier warrantless searches from application of the exclusionary rule. See *Kyllo v. United Stats*, 533 U.S. 27, 40 (2001)("Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause – and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.").

II. The March 4, 2003 Search

On February 24, 2003, Indianapolis Police Detective Ronald Shoemaker collected trash bags that had been left outside Larry Jackson's residence. In searching the trash bags, officers found discarded mail indicating that the house was Larry Jackson's residence. On that day, the officers did not claim to have found any evidence of criminal wrongdoing.

On March 3, 2003, Detective Shoemaker again collected trash bags that had been left outside Jackson's home and searched them. This time the search turned up a plural but unspecified number of "burnt pre-rolled cigarette ends" and several clear plastic baggies that contained a "green leafy vegetation residue." That residue was tested and determined to be marijuana.

The police provided this information by affidavit to a state

court judge on March 3rd. The affidavit also stated that the police had reports of domestic battery by Larry Jackson, and that he was reported to possess several firearms and was reported to have pointed firearms at the victims of the alleged domestic assaults. The affidavit also noted that Jackson was also reported to have several firearms inside his residence and was "alleged to deal narcotics from the residence." The affidavit provided no information about the source or reliability of any of these reports or allegations. The affidavit also did not include any information about the search in February 2002, which was authorized in order to find drug trafficking evidence. (That search had turned up no evidence of drugs or drug trafficking, but the search had produced the firearms and ammunition noted above.) The affidavit also noted that Jackson had an open warrant on a misdemeanor charge of domestic battery, and that he had a prior felony conviction for dealing cocaine from a 1989 case.

On this information, the judge issued a search warrant for the Jackson home. The warrant authorized a search for: "Controlled substances, currency associated with the sale of controlled substances, records and documents associated with the sale of controlled substances and any indicia of the crime [of] dealing and or possessing marijuana and any indicia of this particular crime." The warrant included an order for a no-knock entry.

Officers entered the Jackson residence at dawn on Sunday, March 4th. They did not knock or announce their presence in any way prior to entering. Instead, they broke open the door and fired a flash-bang grenade to stun occupants. During their search, officers found one handgun, two shotguns, and ninety-two rounds of ammunition. Those were seized and are the subject of count two of the superseding indictment. The officers also found two bullet-proof vests, six grams of methamphetamine, 175 grams of

marijuana, and some cocaine residue. Those items are not part of the charges in the present indictment.

It was only from the marijuana cigarette "roaches" and marijuana residue found in Jackson's trash on March 3rd that police could justify a search of Jackson's home the next day. That evidence provided, if just barely, a basis for finding probable cause to believe that there could be more marijuana in the home. See *United States v. Langford*, 314 F.3d 892, 894 (7th Cir.2002)(garbage search showing small quantities of marijuana was sufficient to support search for evidence of crime of possession of marijuana, but not for distribution). Thus, the warrant was lawfully based on probable cause for criminal possession of marijuana. However, everything else in the affidavit, except Jackson's 1989 cocaine conviction, amounted to nothing more than unsupported rumor. There was no evidence to support the warrant to the extent it authorized a search of the house for drug dealing activity. There was no drug dealing paraphernalia listed in the affidavit. There was no information in the affidavit from a confidential informant. See *United States v. McKinney*, 143 F.3d 325, 328-29 (7th Cir.1998)(informant's information and corroboration of details gained by independent police work supported finding of probable cause under totality of circumstances test); *United States v. McNeese*, 901 F.2d 585, 595 (7th Cir.1990)(evidence corroborating an informant's report established probable cause), *overruled on other grounds, United States v Westmoreland*, 240 F.3d 618, 632-33 (7th Cir.2001).

The most striking fact about this search, of course, if the extent of the police's exploitation of probable cause for marijuana possession. The police obviously did not treat this case as a routine marijuana possession case. Dawn raids into homes, launched with flash-bang grenades rather than knocks at the door, are surely rare in such cases.

Jackson contends that the evidence should be suppressed because the method of executing the search warrant was unreasonable. See *Wilson v. Arkansas*, 514 U.S. 927, 934-36 (1995).

"Countervailing law enforcement interests" can justify an unannounced entry. *United States v. Dunnock*, 295 F.3d 431, 434-35 (4th Cir.2002)(futility exception excuses knock and announce requirement where police officer has reasonable suspicion that occupants know of presence and purpose of police prior to entry into residence); *United States v. Mendoza*, 281 F.3d 712, 716 (8th Cir.2002)(exceptions to rule where police have reasonable suspicion that knocking and announcing presence, under particular circumstances, would be dangerous or futile, or that it would inhibit effective investigation of crime by allowing destruction of evidence).

A dawn no-knock raid with a flash-bang grenade in a marijuana possession case, the only charge that the police could support with actual evidence rather than with rumor, is obviously unreasonable. Under Seventh Circuit law, however, unreasonable use of no-knock search warrants does not support suppression of the evidence seized. *Langford*, 314 F.3d at 894. Instead, victims of such tactics are left to available civil remedies under 42 U.S.C. § 1983 and *Bivens* actions. *Id.* at 894-95.

One difference between this case and *Langford* should be noted. In *Langford*, the warrant authorized the seizure of weapons, but the Seventh Circuit indicated that the police had not provided evidence that would support a finding of probable cause as to drug distribution or any weapons-related charge. 314 F.3d at 894. The Seventh Circuit nevertheless affirmed denial of the motion to suppress because the police acted in good faith reliance on a warrant that authorized them to search for and seize weapons. In

this case, the warrant did not specifically authorize seizure of firearms, but the police knew that Jackson had a prior felony conviction. As a result, the officers searching his home could reasonably treat firearms in his home as contraband regardless of the good faith issue or the scope of the warrant. Also, the firearms and ammunition would have been found in a search limited to a search for evidence of possession of marijuana, without the unsupported finding in the warrant as to drug distribution.

Jackson argues that the police misled the judge who issued the search warrant. The police did not inform the judge of the results of the February 17, 2002 search (guns but no drugs). However, the absence of drugs more than a year earlier would not have been material when weighed against the results of a garbage search the day before. Immaterial omissions will not invalidate an otherwise legitimate search warrant. See, *e.g., Forman v. Richmond Police Dep't*, 104 F.3d 950, 964 (7th Cir.1997)(immaterial misstatements will not invalidate otherwise legitimate warrant); *Molina v. Cooper*, 325 F.3d 963, 968 (7thh Cir.2003)(same rules apply to immaterial misstatements and omissions). The evidence cannot be suppressed on this theory.

The March 4, 2003 search was permissible based only on the police's exploitation of the law that allows garbage placed outside a residence for collection to be searched. *California v. Greenwood*, 486 U.S. 35 (1988). The police used a search warrant that was supported by probable cause for a relatively minor crime (possession of person-use quantities of marijuana) to look for evidence of much more serious crimes that they suspected, but for which they did not have probable cause. The court is not aware of any constitutional principle under existing law, however, requiring that the extent of the search or the police resources devoted to it be proportional to the seriousness of the crime for which probable cause has been shown. Under

existing law, the court finds that no legal basis for suppressing the evidence seized in the March 4, 2003 search of Jackson's home.

Conclusion

For the foregoing reasons, defendant Jackson's motion to suppress is hereby granted with respect to evidence seized on February 17, 2002 but denied with respect to evidence seized on March 4, 2003.

So ordered.

2004 WL 1784756 (S.D.Ind.)